

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	
)	
Access Charge Reform)	CC Docket No. 96-262
)	
Price Cap Performance Review)	CC Docket No. 94-1
for Local Exchange Carriers)	
)	
Transport Rate Structure)	CC Docket No. 91-213
and Pricing)	
)	
End User Common Line Charges)	CC Docket No. 95-72
)	

**REPLY TO OPPOSITIONS TO PETITION FOR
RECONSIDERATION OF THE RURAL TELEPHONE COMPANIES**

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RECONSIDERATION OF THE RURAL TELEPHONE COMPANIES**

The Rural Telephone Companies (the "RTCs"), by their attorneys and pursuant to 47 C.F.R. § 1.429(g), respectfully submit this Reply to the Oppositions¹ filed against the RTCs' Petition for Reconsideration of the Commission's First Report and Order² (hereinafter referred to as the "Report and Order" or "R&O") and Order on Reconsideration³ in the above-captioned proceedings.

**I. THE R&O VIOLATES THE FIFTH
AMENDMENT OF THE UNITED STATES CONSTITUTION.**

The Report and Order requires unbundled network elements to be provided to interexchange carriers ("IXCs") for interstate access service without the assessment of any

¹ The following entities filed Oppositions: WorldCom, Inc. ("WorldCom"), the Telecommunications Resellers Association ("TRA"), the Competition Policy Institute ("CPI"), MCI Telecommunications Corporation ("MCI"), AT&T Corporation ("AT&T") and Sprint Corporation ("Sprint").

² 62 Fed. Reg. 31,868 (June 11, 1997).

³ In the Matter of Access Charge Reform, Order on Reconsideration, FCC 97-247 (released July 10, 1997).

interstate tariffed rate.⁴ The Report and Order effects a taking under the Fifth Amendment of the United States Constitution by requiring the RTCs to provide interstate access service to IXC's on an unbundled basis without providing the RTCs with an opportunity to recover the interstate costs of doing so.

The Supreme Court has clearly set forth the elements of rate making takings.⁵ In applying the Takings Clause to rate setting for public utilities, the Court has stated that "[t]he guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory."⁶ Furthermore, the determination of whether a rate is confiscatory depends upon whether that rate is just and reasonable.⁷

The Commission has defined a "reasonable" rate of return as 11.25 percent.⁸ The Report and Order causes the RTCs' rates of return to fall far below this "reasonable" level.⁹ Therefore, the Report and Order effects a confiscatory taking of the RTCs' property without just

⁴ See R&O at para. 337.

⁵ See Duquesne Light Co. v. Barasch, 488 U.S. 299, 307 (1989); see also Federal Power Commission v. Hope Natural Gas, 320 U.S. 591 (1944).

⁶ Duquesne, 488 U.S. at 307.

⁷ See Hope Natural Gas, 320 U.S. at 602-603; see also Duquesne; In re Permian Basin Area Rate Cases, 390 U.S. 747 (1968); Federal Power Commission v. Memphis Light, Gas & Water Division, 411 U.S. 458 (1973); Jersey Central Power & Light v. FERC, 810 F.2d 1168 (D.C. Cir. 1987).

⁸ See Authorized Rates of Return for Interstate Services (Represcription of LEC Rate of Return), 6 FCC Rcd 7193 (1991).

⁹ See RTCs' Petition for Reconsideration ("Petition"), Exhibit Two.

compensation, violating the Fifth Amendment.¹⁰

TRA relies on Metropolitan Transit Authority¹¹ as support for its contention that the Report and Order does not result in a confiscatory taking of the RTCs' property.¹² Yet, the Court's reasoning in that decision clearly supports the RTCs' position. The Court stated that "the guiding principle of what is just compensation" is whether the petitioner "will be put into the same position monetarily as it would have occupied if the property had not been taken . . ."¹³ Clearly, the RTCs will not be in the same monetary position as before the Report and Order. Thus, the losses created by the R&O fall within the Court's "guiding principle" of a taking without just compensation.

The Report and Order's impact on the RTCs' return on investment is not "meager";¹⁴ they will suffer a negative return on investment, thus meeting the "threat to financial viability" prerequisite that AT&T argues is the proper "confiscatory" standard.¹⁵ Although nothing in the Constitution "shields carriers from losses or insulates their investors from declining investment values,"¹⁶ the Fifth Amendment does protect against the government's taking of private property

¹⁰ It is true, as AT&T Corporation notes in its Opposition at 18, that the Fifth Amendment does not guarantee an 11.25 percent rate of return. However, the Fifth Amendment does protect against confiscatory takings, and, under the case law which established the elements of a confiscatory rate order, cited above and in AT&T's Opposition, the R&O effects such a Fifth Amendment violation.

¹¹ Metropolitan Transp. Authority v. I.C.C., 792 F.2d 287, 297 (2d Cir. 1986), cert. denied 479 U.S. 1017 (1986).

¹² See TRA Opposition at 21.

¹³ Metropolitan Transp. Authority v. I.C.C., 792 F.2d at 297.

¹⁴ See TRA Opposition at 20 (citing Hope Natural Gas, 320 U.S. at 605).

¹⁵ See Petition, Exhibit Two.

¹⁶ See TRA Opposition at 20.

without just compensation.¹⁷

**II. THE COMMUNICATIONS ACT SUPPORTS
BILLING INTERSTATE ACCESS SERVICE
\\ CHARGES FOR UNBUNDLED INTERSTATE ACCESS SERVICE.**

A few petitioners claim that the R&Q is sound,¹⁸ and that there is no statutory basis for billing interstate access charges for providing unbundled network elements that are used for interstate access service.¹⁹ Yet, Section 203 of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. Section 203, requires incumbent local exchange carriers (“ILECs”) to file tariffs with the Commission setting forth the rates they charge for interstate access services and prohibits them from collecting different compensation for interstate access services than those tariff rates. Pursuant to Section 205 of the Communications Act, 47 U.S.C. Section 205, the Commission prescribed a regulated rate of return on interstate costs of 11.25 percent for the RTCs. The RTCs’ interstate access tariff rates were developed on the basis of this authorized rate of return. Whether the RTCs provide interstate access services on a bundled or unbundled basis, the Communications Act requires them to bill their tariff rates for that interstate service.

However, the R&Q requires ILECs to provide unbundled network elements for the provision of interstate access services without billing any interstate charges set forth in tariffs filed with the Commission. When the same network elements are provided on a bundled basis, the Commission requires ILECs to bill their interstate access tariff rates. This constitutes

¹⁷ U.S. Const. amend. V.

¹⁸ See Sprint Opposition at 7.

¹⁹ See WorldCom Opposition at 2-3; Telecommunications Resellers Association (“TRA”) Opposition at 18.

unreasonable discrimination that violates Section 202(a) of the Act.²⁰ The R&O also violates Sections 7 and 254(b)(2) of the Act by eviscerating ILECs' revenues, thus severely discouraging investment in new technologies, lowering universal service support and endangering affordable local telephone rates.²¹ Finally, the R&O's deviation from interstate access tariffs filed with the Commission, and the Commission's own rate of return regulations, violates Section 203(c) of the Act.²² Thus, the Act requires the same interstate access tariff rates to be billed for interstate access services whether provided through bundled network elements or unbundled network elements.²³

III. THE COMMISSION'S STAY ORDER DOES NOT APPLY TO THE RURAL TELEPHONE COMPANIES' PETITION.

Some petitioners erroneously rely on the Commission's recent denial of a motion to stay.²⁴ However, that Commission ruling is inapposite. The RTCs have presented dramatically different facts in their Petition than those presented by the petitioners involved in the Stay Order.²⁵

The Commission found that the Stay Order petitioners would not suffer irreparable harm without a stay of the R&O because their earnings would be well above the Commission-

²⁰ See R&O at para. 337 and 47 U.S.C. Section 202(a).

²¹ See 47 U.S.C. Sections 7 and 254(b)(2).

²² See 47 U.S.C. Section 203(c).

²³ GTE Service Corporation ("GTE") supports the RTCs' position, arguing that a failure to permit the assessment of access charges on interstate services provided through unbundled network elements violates Sections 202(a) and 254(d) of the Act. See GTE's Opposition to and Comments on Petitions for Reconsideration at 20-23.

²⁴ Access Charge Reform, Order, CC Docket No. 96-262, FCC 97-216 (released June 18, 1997) ("Stay Order").

²⁵ See Petition.

prescribed 11.25 percent rate of return.²⁶ This is not so with the RTCs, which will suffer rates of return for interstate access service far below the Commission's prescription because of the rules adopted in the R&O.²⁷ The RTCs' negative returns on investment, which reach 140.5 percent, are devastating and threaten the viability of their services to the public, which in turn would effect a substantial harm to the public interest.²⁸ Here, the Commission faces a different set of facts than in the Stay Order, and it should arrive at a different conclusion.

IV. THE HARM TO THE RTCs IS NOT SPECULATIVE.

WorldCom and AT&T assert that the harm demonstrated by the RTCs is speculative.²⁹ The RTCs did not make a "blanket assertion" that unbundled network element rates will not be compensatory: they proved it with hard economic data. The simple fact remains that ILECs will not receive compensation for their embedded interstate costs and interstate investment under the rates adopted in the R&O. The harm to the RTCs is clear -- they will incur substantial losses if they recover only forward-looking costs for their provision of facilities used to provide interstate services.

WorldCom and AT&T claim that this is only a "speculative" harm because the Act exempts the RTCs from the obligation to unbundle network elements.³⁰ However, the Act

²⁶ See Stay Order at para. 31.

²⁷ See Petition, Exhibit Two.

²⁸ Id.

²⁹ See WorldCom Opposition at 8-11; AT&T Opposition at 19.

³⁰ See WorldCom Opposition at 8-11; AT&T Opposition at 19.

establishes a mechanism by which the RTCs can lose their exemption.³¹ The elimination of this exemption is entirely within the discretion of State commissions and outside the control of the Commission. This process has already commenced in several states,³² and many RTCs will likely lose that exemption and be required to unbundle network elements. Thus, the RTCs' Petition is not speculative.

**V. INTERSTATE ACCESS SERVICE REQUIRES
THE RTCs TO PROVIDE THE SAME FACILITIES
WHETHER PROVIDED ON A BUNDLED OR UNBUNDLED BASIS.**

WorldCom argues that the provision of "services" is different from the provision of "elements."³³ WorldCom completely misses the point, and confuses the provision of unbundled network elements for the provision of local exchange service with the provision of interstate access service. WorldCom misreads the Eighth Circuit's decision as it dealt with local, not interstate, access.³⁴ The Eighth Circuit in Iowa Utilities did not address whether ILECs must provide unbundled network elements free of interstate access charges.³⁵

Furthermore, WorldCom misreads Section 252(d)(1) of the Act, and the related CompTel

³¹ See 47 U.S.C. Section 251(f).

³² See In the Matter of the Application of Classic Telephone, Inc. for a Certificate of Convenience and Necessity to Provide Basic Local Telecommunications Services, Local Exchange Telecommunications Services and Exchange Access Services in the Ellis, Kansas and Wakeeney, Kansas Local Exchange, and Environs Thereby, Application for Certificate of Convenience and Necessity, Docket No. 98-CLST-072-COC, para. 16(f) (August 7, 1997). See also Indiana Reconsiders Rural Exemption Denials, TR Daily, August 15, 1997.

³³ See WorldCom Opposition at 4-6.

³⁴ See Iowa Utilities Board v. F.C.C., No. 96-3321, 1997 WL 403401 at *2 (8th Cir. 1997) ("Iowa Utilities").

³⁵ This is contrary to AT&T's erroneous assertion that the Eighth Circuit reached that conclusion in footnote 39 of its Iowa Utilities decision. See AT&T Opposition at n.36. Nowhere in footnote 39 of its decision does the Court prohibit billing interstate access charges for the provision of unbundled network elements used to obtain interstate access service. AT&T's citation is incorrect.

decision, because that Act section concerns local pricing standards for interconnection.³⁶ That section specifically refers to the State commissions. It deals with only intrastate communications, which are under the exclusive jurisdiction of the State commissions³⁷, and not interstate communications, which are subject to the Commission's jurisdiction.³⁸ The RTCs' Petition involves solely interstate access service over which the State commissions have no ratemaking or arbitration authority. WorldCom's argument is irrelevant to this proceeding.

CPI also erroneously applies decisions concerning local telephone service to the interstate context, by citing the Commission's Local Competition Order to support its argument that the Commissions' forward-looking Total Element Long Run Incremental Costs ("TELRIC") method is the correct cost standard for unbundled network elements.³⁹ Not only does CPI's argument suffer from the same "local versus interstate" problem as WorldCom, but it is contrary to Section 251(g) of the Act. That section manifests Congressional intent to maintain rate of return regulations for the provision of interstate access services that were in place when the Telecommunications Act of 1996 was enacted.⁴⁰

The Commission has not provided any sustainable basis upon which to suddenly depart from its rate of return regulation of interstate access services, whether incumbent local exchange

³⁶ See 47 U.S.C. Section 252(d)(1). The first five words of this section are: "Determinations by a State commission . . ."

³⁷ See Iowa Utilities at *5-*6.

³⁸ Id.

³⁹ See CPI Opposition at 11.

⁴⁰ See 47 U.S.C. Section 251(g).

carriers provide them on a bundled or unbundled basis. Section 205 of the Act⁴¹ and the Commission's rules still allow the RTCs, as rate of return regulated carriers, to earn a just and reasonable rate of return on their booked costs.⁴² As the RTCs have demonstrated,⁴³ the Report and Order is inconsistent with those provisions. Because the Commission did not consider the negative returns on investment that will result from the Report and Order, it has failed to undertake "the investigations and the resolutions essential to a legitimate exercise of its authority to prescribe just and reasonable fares."⁴⁴ If, in fact, the Commission's action signals an immediate end to the currently prescribed rate-of-return regulations, the Commission has not indicated as much, and it would violate the Administrative Procedure Act to give the R&O such an effect.⁴⁵ Thus, the Commission's rate of return regulations remain in place pursuant to Section 251(g) of the Act.⁴⁶ The Eighth Circuit agrees with this interpretation.⁴⁷

⁴¹ See 47 U.S.C. §205.

⁴² See gen. 47 C.F.R. Part 65.

⁴³ See Petition, Exhibit Two.

⁴⁴ Williams v. Washington Metropolitan Area Transit Com'n, 415 F.2d 922, 938-39 (D.C. Cir. 1968), cert. denied, 89 S. Ct. 860 (1969). See also Commonwealth Tel. Co. v. Public Serv. Comm'n, 252 Wis. 481, 32 N.W. 2d 247, 248-249 (1948); New England Teleph. & Teleg. Co. v. State, 64 A.2d 9 (1949); Milwaukee & Suburban Transp. Corp. v. Wisconsin Pub. Service Comm., 108 N.W. 2d 729 (1961).

⁴⁵ See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) (when agency changes its course [it] must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored")

⁴⁶ Id.

⁴⁷ See Competitive Telecommunications Association v. Federal Communications Commission, 117 F.3d 1068, 1072-73 (8th Cir. 1997).

VI. THE R&O WILL CAUSE THE MOST MARKET DAMAGE.

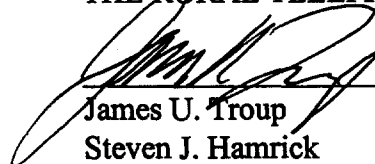
WorldCom and CPI allege that the relief requested by the RTCs would somehow reduce competition.⁴⁸ However, they do not provide any cost study or economic analysis to support this assertion. The R&O's exclusion of the ILECs' embedded interstate costs discourages existing and new market entrants from committing the necessary resources to provide innovative services, and generally depresses investment in the provision of telecommunications services to the public. As a result, consumers would have fewer telecommunications choices because of the R&O, and face higher prices for that narrower menu of options. The Commission, and WorldCom, cannot expect a market to reach a fully competitive state when regulatory forces discourage investment in that market.

VII. CONCLUSION.

For all the foregoing reasons, the RTCs urge the Commission to reconsider its First Report and Order and Order on Reconsideration.

Respectfully submitted,

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⁴⁸ See WorldCom Opposition at 6.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August __, 1997, copies of the foregoing Reply to
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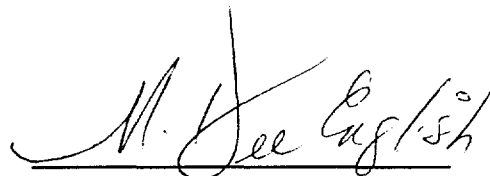
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